Supreme Court, U. S.
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IN THE

Supreme Court of the United States

_____ TERM, 1979

NO. 79-60

TIMOTHY ALDEN HAYES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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The Petitioner, Timothy Alden Hayes prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 595 F.2d 258 (1979). It is set out in the Appendix Infra, p. A-1.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 17, 1979. Petition for Rehearing was denied on June 14, 1979. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

QUESTION ONE

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE CONSTITUTIONALITY OF 21 C.F.R. § 1306.04(a) USED IN CONJUNCTION WITH TITLE 21 U.S.C. § 841 AS APPLIED TO PHARMACISTS WHEN SAID STATUTE VIOLATES PETITIONERS FIFTH AMENDMENT RIGHTS OF DUE PROCESS BECAUSE IT FAILS TO GIVE ADEQUATE NOTICE THAT CERTAIN CONDUCT IS PROSCRIBED AND IS VOID OF ANY STANDARD BY WHICH A PHARMACIST MAY PROTECT HIMSELF FROM CRIMINAL PROSECUTION.

QUESTION TWO

WHETHER IT IS POSSIBLE FOR PETITIONER TO BE CONVICTED FOR CONSPIRACY TO VIOLATE 21 U.S.C. § 841(a) (1) WHILE THE OTHER ALLEGED CO-CONSPIRATORS PLED GUILTY TO A VIOLATION OF 21 U.S.C. § 843(a) (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury * * *; nor shall any person * * * be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

1. Title 21, United States Code, Section 841(a)(1) provides: (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> (1) To manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

2. Title 21, United States Code, Section 843(a)(3) provides: (a) It shall be unlawful for any person knowingly or intentionally—

> (1) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

3. Title 21, Code of Federal Regulations, Section 1306.04(a) provides:

> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly

filling such a purported prescription, as well as the person using it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

STATEMENT

The Petitioner, Timothy Alden Hayes was convicted of violating Title 21, United States Code, Section 841 (a)(1) and Title 21, Code of Federal Regulations, Section 1306.04(a) in that he allegedly dispensed controlled substances to fill prescriptions which he knew were not issued in the usual course of professional practice for a legitimate medical purpose. To the accusation Petitioner pled not guilty. On April 20, 1978 the Petitioner was found guilty and sentenced to five (5) years imprisonment.

STATEMENT OF THE NATURE OF THE CASE

Appellant is one of 12 alleged co-conspirators charged in a 79 count Indictment with conspiracy to dispense and distribute Schedule II controlled substances in violation of 21 U.S.C. 841(1)(1), 21 C.F.R. 1306.04(a) and distributing Schedule II controlled substances pursuant to prescriptions which he knew bore false and ficticious names and which he knew were not issued in the usual course of professional practice for legitimate medical purposes in violation of 21 U.S.C. 841(1)(1) and 21 C.F.R. 1306.04(a). Said Indictment was filed on December 6, 1977.

Defendant was arraigned and pled not guilty.

A jury trial commenced on April 4, 1978 and the jury began deliberations on April 20, 1978. The jury deliberated approximately 7 hours and found Appellant guilty on Counts 1, 6, 7, 8, 9, and 48 through 79, these being all the counts of the Indictment involving this Appellant. Appellant was sentenced to five years confinement on Count I plus a special parole term of five years; five years probation with supervision with a special condition of probation being that he surrender his license to the Court, with notification to the Pharmacy Board and that he divest himself of any interest in any pharmacy within 30 days on Count 6; and five years confinement plus five years special parole to run concurrently with the sentence imposed on Counts 7, 8, 9, and 48 through 79.

This was affirmed by the Fifth Circuit Court of Appeals in an opinion rendered May 17, 1979.

Petitioner thereupon timely filed his Motion for Rehearing. In this motion he raised a substantial federal question, namely, whether a statute which is devoid of any standard by which a pharmacist may protect himself, can support a conviction, without violating Petitioner's Fifth Amendment Right to Due Process of Law.

As Petitioner argued in his Motion for Rehearing, the evidence at trial showed that he had availed himself of every means to verify the legitimacy of the prescriptions, namely, calling Dr. Bennett, he should have been insured against prosecution.

The opinion of the Fifth Circuit noted that by phoning a physician, a pharmacist shows some evidence of his lack of knowledge but that this is not an insurance policy against criminal sanction.

Petitioner argued in his Motion for Rehearing, that if it is not insurance it was encumbent on that Court to

delineate what would be. The opinion of the Court of Appeals states that a pharmacist may "fill or not fill" a prescription. This is not sufficient notice for the practicing pharmacist. The Panel in the opinion admits that the statute is not "crystal clear", but did not avail itself of this opportunity to clarify the statute. The issue of the applicability of 21 C.F.R. § 1306.04(a), Title 21 U.S.C. § 841(a)(1) to Pharmacists has never been decided by the Court. Because of the vital function which a pharmacist performs, the chilling effect of an admonition to "fill or not fill" should be carefully considered before being allowed to become controlling precedent in this important area.

REASONS FOR GRANTING THE WRIT

QUESTION ONE (Restated)

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE CONSTITUTIONALITY OF 21 C.F.R. § 1306.04(a) USED IN CONJUNCTION WITH TITLE 21 U.S.C. § 841 AS APPLIED TO PHARMACISTS WHEN SAID STATUTE VIOLATES PETITIONERS FIFTH AMENDMENT RIGHTS OF DUE PROCESS BECAUSE IT FAILS TO GIVE ADEQUATE NOTICE THAT CERTAIN CONDUCT IS PROSCRIBED AND IS VOID OF ANY STANDARD BY WHICH A PHARMACIST MAY PROTECT HIMSELF FROM CRIMINAL PROSECUTION.

The Fifth Circuit Court of Appeals recognized that the purpose of the regulation is to define the circumstances in which a physician or pharmacist who is registered to dispense controlled substances may nevertheless

be held to have violated the proscription against manufacturing, distributing, or dispensing a controlled substance in 21 U.S.C. § 841. *U.S. v. Hayes,* No. 78-5347 (5th Cir. 1979). Petitioner Hayes contends that 21 C.F.R. § 1306.04(a) fails to give notice of the standard by which a pharmacist may determine compliance with the law.

The decision below imposes criminal liability on a pharmacist if he fills an order that purports to be a prescription but is not a prescription within the meaning of the statute because he knows that the issuing practitioner issued it outside the scope of medical practice. Hayes contends that the statute must be examined in advance of any jury findings and that the lower court indulged in circular reasoning by stating "the facts of this case show how a pharmacist can know prescriptions are issued for no legitimate medical purpose". *U.S. v. Hayes,* supra footnote 6. Furthermore, the recognition that the phrase "corresponding responsibility" is not crystal clear, because a pharmacist can not be held to the same standard as a physician, illustrates the vagueness in which the statute is worded.

As presently construed § 1306.04(a) applied through § 841 offends several important values; first it traps innocent pharmacists, such as Hayes, by failing to provide fair warning, and secondly it impermissibly delegates basic policy matters to police, judges and juries for resolution on an ad hoc and subjective basis to determine compliance with the attendant dangers of arbitrary and discriminatory application.

If arbitrary and discriminatory enforcement is to be prevented laws must provide explicit standards for those

who apply then. Petitioner had no advance notice of what his corresponding responsibility was and to hold him criminally liable for knowingly dispensing narcotics outside the course of professional medical practice after he exceeded his professional activities by verifying the prescriptions with the issuing physician holds him liable for factors which he had no control over and which he could not adequately protect himself against. The lower court's reasoning that he may either fill a prescription or decline to do so is also evidence of the lack of standard by which a pharmacist may determine his compliance with the regulation.

Congress may not impose upon a pharmacist, at the peril of criminal prosecution, the duty of resolving to what extent he may rely upon a doctor's good faith verification of a prescription when such medical judgment is routinely made by physicians.

This is not a situation where Congress failed to choose clear and more precise language equally capable of achieving the end which it sought but rather the more onerous situation where Congress has not provided any standard by which a pharmacist may operate his business and protect himself from criminal responsibility. Under the rationale of the Fifth Circuit a pharmacist can never fill a prescription with the confidence that it would not later be determined that the prescription was not issued by the physician for legitimate medical purposes.

When a choice has to be made between two readings of what conduct Congress has made a crime it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language

that is clear and definite. *U. S. v. Bass*, 404 U.S. 336 (1971); *U. S. v. C.I.T. Credit Corp*, 344 U.S. 218 (1952).

The Supreme Court has reasoned and the Fifth Circuit has accepted the proposition that, if a physician is licensed by the State, and the Drug Enforcement Administration, he is recognized by these agencies as capable of exercising acceptable clinical judgment in the treatment (including the prescribing of controlled substances) of his patients. "It is still true today that reliance must be placed upon the assurance given by his license issued by an authority competent to judge in that respect, that he (the physician) possesses the requisite qualification" *Doe v. Bolton*, 410 U.S. 200 (1973).

From this predicate it is apparent that if 21 U.S.C. § 841 is not vague then verification by the licensed doctor must be an insurance policy for the pharmacist.

It would be highly anomalous for Congress to authorize a physician to prescribe controlled substances, but leave a pharmacist in peril of up to fifteen years imprisonment, for relying on the authority granted to the physician by the licensing agency and the doctor's verification of the bona fides of a particular prescription.

Vagueness challenges which do not invoke First Amendment freedoms must be examined in the light of the facts of the case at hand. *U. S. v. Mazurie*, 419 U.S. 544 (1975). The record of this case discloses that Hayes called Dr. Bennett to verify the prescriptions issued by Dr. Bennett (R. Vol. 1, p. 80-81). Dr. Bennett further testified that he *never* communicated the fact to

Hayes that his prescriptions were *not* issued in the course of professional practice for legitimate medical purposes (R. Vol. 1, p. 141, 145-147). Dr. Bennett further testified that as to the purchases by Claude Meade that he, Dr. Bennett, had examined all these people as patients, that the prescriptions were good, that the patients had a bona fide need for the medicine and to go ahead and fill the prescriptions. It is also important to note that the expert testimony adduced at trial illustrated that Hayes went beyond the normal course of his professional activities by verifying the prescription with Dr. Bennett even though there is no requirement to do so (R. Vol. 8, p. 58, 72). As previously stated, if § 1306.04(a) is not vague, as applied to pharmacists, then reliance by a pharmacist on a doctor's judgment in prescribing a controlled substance and verification by the doctor of the prescription presented satisfies the requirements of 21 U.S.C. § 841.

Statutes which proscribe no comprehensible course of conduct may not be constitutionally applied to any set of facts. *U.S. v. Powell*, 423 U.S. 87 (1975). While § 841 does forbid a specific act it provides no notice of any standard by which a pharmacist may adequately guard against. It is analogous to a statute making speeding illegal, but not giving fair notice of what a legal speed is. Under the lower court's rationale the conviction for speeding would be sustained if a jury subsequently determines that the Defendant *knew* he was speeding.

The hindsight reasoning adopted by the Fifth Circuit also overlooks the fact that the jury had no standard by which to determine when a pharmacist has complied with the requirements of 21 U.S.C. § 841 regardless of

the Court's charge. The Court merely stated that the facts justified the conviction but they failed to specify by what standard a pharmacist is to govern his professional activities.

This reasoning is analogous to the Court upholding a Fourth Amendment question involving probable cause by saying that probable cause may be bolstered by results or fruits of a subsequent search.

The law requires that there be ascertainable standards of guilt such that men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act or in regards to the *applicable tests to ascertain guilt*. *Winters v. New York*, 333 U.S. 507 (1948).

The Fifth Circuit, by its refusal to accept verification as an insurance policy and leaving the pharmacist as his only option to fill or not to fill the prescription, leaves the pharmacist at his peril whenever he fills a prescription. This uncertainty has a chilling effect on a pharmacist's proprietary right in the operation of his business and further thwarts medical treatment because it leaves this regulation open to arbitrary and invidious discrimination beyond reason in its application.

Hayes contends that it is the statute, not arbitrary de facto jury findings under it, that must prescribe the rule of conduct and warn against its transgression.

Petitioner Hayes respectfully submits that 21 C.F.R. § 1306.04(a) used in conjunction with § 841 is so vague and indefinite as applied to pharmacists that its application to him violates the first essential of due pro-

ces of law because it amounts to the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no standard at all. *U.S. v. Powell,* 423 U.S. 87 (1975); *U.S. v. Cohen Grocery,* 255 U.S. 81 (1921).

If 21 C.F.R. § 1306.04(a) is not unconstitutionally vague then verification by the issuing physician must be an insurance policy for pharmacists (compliance as a matter of law) so that they may protect themselves from criminal responsibility and legitimately operate the business that they are trained and licensed to run.

QUESTION TWO (Restated)

WHETHER IT IS POSSIBLE FOR PETITIONER TO BE CONVICTED FOR CONSPIRACY TO VIOLATE 21 U.S.C. § 841(a) (1) WHILE THE OTHER ALLEGED CO-CONSPIRATORS PLED GUILTY TO A VIOLATION OF 21 U.S.C. § 843(a) (3).

Title 21 U.S.C. § 843(a)(3) makes it a crime to "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge". In order for a person to be guilty of this crime it is necessary that some other person or persons be defrauded, deceived or in some manner misled as to the actual facts. 37 C.J.S. Fraud § 3 (1943). Petitioner Hayes was convicted for dispensing controlled substances on the authority of prescriptions which he knew to be issued not in the normal course of professional practice, for a legitimate medical purpose.

Petitioner maintains that it is a logical impossibility for one group of alleged co-conspirators to violate these

two statutes simultaneously. If the other alleged co-conspirators are guilty of obtaining controlled substances by fraud, misrepresentation, forgery deception or subterfuge, the only possible person who this deception was worked upon was the Petitioner. The evidence at trial clearly demonstrated that it was a part of the conspiracy to keep the Petitioner ignorant of the fact that the prescriptions were not legitimate.

Dr. Bennett testified that there was no agreement or conspiracy between himself and Hayes (R. Vol. 1, p. 63-64). He further testified that Hayes called him to verify many of the prescriptions he issued. (R. Vol. 1, P. 80-81) and that Hayes would call him and the police when forged prescriptions were presented to him. (R. Vol. 1, P. 82). The doctor never communicated to Hayes the fact that he had written any prescriptions not in the course of professional practice for a legitimate medical purpose (R. Vol. 1, P. 161-162, 169) but to the contrary the evidence disclosed that Dr. Bennett actually told Hayes that the prescriptions were issued by him for some injury, ailment, or illness of a patient after examination. (R. Vol. 1, P. 67-68).

Thomas Hammond, an indicted and alleged co-conspirator testified that he had no agreement with Hayes. (R. Vol. 5, P. 88). C. W. McKay, an indicted and alleged co-conspirator testified that he had no agreement with Hayes. (R. Vol. 5, p. 153). Charlotta Wills, another indicted and alleged co-conspirator testified that she had no agreement with Hayes. Both Judy Adams and Charlotta Wills, the two women who were employed by Dr. Bennett as receptionists during the time the alleged conspiracy took place, testified that Hayes would regu-

larly call to verify Dr. Bennett's prescriptions. (R. Vol. 7, p. 56, 60 and Vol. 9, p. 30).

On the other hand all of these alleged co-conspirators admitted that they had obtained controlled substances through the use of misrepresentation, fraud, forgery, deception or subterfuge. When the above testimony is considered together with the guilty pleas of the alleged co-conspirators the conclusion that Hayes was defrauded becomes inescapable.

Petitioner does not dispute the sufficiency of the evidence of a conspiracy to defraud but rather contends that he was a victim of this conspiracy.

The ultimate issue in the Petitioner's trial was; did he know that the prescriptions were not legitimate? The evidence showed that they were not, however it is also shown that Hayes was unaware of this fact. It was crucial to the success of the alleged conspiracy that Hayes be kept in the dark. All of the acts of the co-conspirators which inculpate them must by definition exculpate the Petitioner. To indulge in this basic logical inconsistency makes a mockery of a system of justice based upon narrowly drawn statutes prohibiting specific acts. In order to sustain the validity of the convictions of the other alleged co-conspirators Hayes, by legal definition, must be innocent of the crime for which he has been convicted.

CONCLUSION AND PRAYER

For all the reasons stated above, the petition for writ of certiorari should be granted and petitioner's conviction and sentence set aside.

Petitioner prays for such relief.

Respectfully submitted,

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CERTIFICATE

I certify that three copies of the foregoing petition for writ of certiorari was mailed to John Potter, 515 Rusk, Houston, Texas, on this 12th day of July, 1979.

ROBERT C. HUNT

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TIMOTHY ALDEN HAYES,
Defendant-Appellant.

NO. 78-5347.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

May 17, 1979.

Defendant, a registered pharmacist, was convicted in the United States District Court for the Southern District of Texas at Houston, John V. Singleton, Jr., J., of conspiracy to distribute Schedule II controlled substances, and he appealed. The Court of Appeals, Godbold, Circuit Judge, held that: (1) the statute and accompanying regulation under which the pharmacist was convicted were not unconstitutionally vague, and (2) the evidence was sufficient to support the conviction.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before GODBOLD, SIMPSON and RONEY, Circuit Judges.

GODBOLD, Circuit Judge:

Hayes, a registered pharmacist, was convicted of one count of conspiracy to distribute Schedule II controlled

substances in violation of 21 U.S.C. § 841(a)(1) and 21 C.F.R. 1306.04(a) promulgated thereunder and 35 counts of distribution of Schedule II drugs pursuant to prescriptions which he knew bore false names or were not issued in the usual course of professional practice. The substances were Dilaudid, a narcotic similar to morphine, and Preludin. Hayes asserts that the statute and accompanying regulation are unconstitutionally vague, that there was insufficient evidence to support the convictions, and that there was a variance. We reject all these claims and affirm the conviction.

We set out in the margin the statute and the regulation.[1]

---

1. (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance;

* * *

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

* * *

Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment. . . .

* * *

21 U.S.C. § 841.

Purpose of issue of prescription.

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in

The purpose of the regulation is to define the circumstances in which a physician or pharmacist who is registered to dispense controlled substances may nevertheless be held to have violated the proscription against manufacturing, distributing or dispensing a controlled substance contained in 21 U.S.C. § 841. In *U. S. v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975), the Supreme Court concluded that a doctor may be convicted for violations of § 841 when he dispenses controlled substances "outside the usual course of professional practice." *Id.* at 124, 96 S.Ct. at 337, 46 L.Ed.2d at 337.[2] The court rejected the argument that, because a doctor is registered with HEW and may therefore legally prescribe controlled substances, he is exempted from the criminal sanctions of § 841. A registered doctor or pharmacist is exempted from § 841's proscription only when he acts in the normal course of his professional activities. The challenged regulation merely restates the Court's conclusion in *Moore*.

In *U. S. v. Collier*, 478 F.2d 268 (CA5, 1973), this court rejected a physician's vagueness challenge to § 841 and accompanying regulations. The court drew its vagueness standard for testing § 841 from the Supreme Court's

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legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. § 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 C.F.R. § 1306.04.

2. This court held in *U. S. v. Rosen*, 582 F.2d 1032 (C.A. 5, 1978), that to convict a physician of violating 21 U.S.C. § 841(a)(1) it is necessary to prove "(1) that he distributed or dispensed a controlled substance, (2) that he acted knowingly and intentionally, and (3) that he did so other than for a legitimate medical purpose and in the usual course of his medical practice." *Id.* at 1033.

opinions in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and *U. S. v. Vuitch*, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971). Both of those cases involved a constitutional attack on state statutes prohibiting doctors from performing an abortion unless the doctor concluded that it was necessary to preserve the mother's health. The Court concluded that whether an operation is necessary is the type of professional judgment doctors are "called upon to make routinely." *Doe v. Bolton, supra* at 192, 93 S.Ct. at 747, 35 L.Ed.2d at 212 (quoting *U. S. v. Vuitch, supra* 402 U.S. at 72, 91 S.Ct. at 1299, 28 L.Ed.2d at 601). The *Collier* court decided that a doctor's judgment whether a patient needs a Schedule II drug is also a routine judgment and that a criminal standard that only makes unlawful the prescribing of drugs outside the course of professional practice is not unconstitutionally vague. *Id.* at 272; *accord, U.S. v. Anderson*, 523 F.2d 1192, 1197 (CA5, 1975).

[1] We turn then to application of statute, regulations, and case law to pharmacists. We need none of these to tell us that pharmacists usually are engaged in dispensing drugs on the basis of prescriptions issued by doctors. Specifically, § 309 of the Controlled Substances Act[3] prohibits dispensing Schedule II drugs except upon the prescription of a registered practitioner other than a pharmacist.[4] The regulation, 21 C.F.R. § 1306.04(a), teachs

3. Public Law 91-513, Tit. II, § 309, 84 Stat. 1260 (1970) codified as 21 U.S.C. § 829.

4. Section 102(20) defines practitioner to mean "a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to,

us that under some circumstances a purported prescription is not a prescription at all for purposes of the statute.

> [A]n order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. § 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Thus, a pharmacist may not fill a written order from a practitioner, appearing on its face to be a prescription, if he knows the practitioner issued it in other than the usual course of medical treatment. The regulation gives "fair notice that certain conduct is proscribed." *Rabe v. Washington*, 405 U.S. 313, 315, 92 S.Ct. 993, 994, 31 L.Ed.2d 258, 260 (1972).

[2] Hayes contends that the regulation is unconstitutionally vague because of the language immediately preceding the foregoing, stating that "[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription." A pharmacist, he argues, cannot have a "corresponding responsibility" to that of a practitioner because he cannot prescribe at all but only dispense; an attempt by regulation to impose on him the

administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research." 21 U.S.C. § 802(20).

obligations of a prescriber must, therefore, be ineffectual.[5] From this predicate he urges that the physician cases must be distinguished as applied to him; that is, a practitioner may be held criminally liable for prescribing outside the course of his professional practice, but a pharmacist may not be criminally liable based upon a "corresponding responsibility" because he cannot have responsibility as a prescriber nor does he have any reasonable means to fulfill a duty of establishing that the practitioner-prescriber who issued the order did so in the usual course of medical treatment. He points out that the most the pharmacist can do to verify the bona fides of a prescription is to check with the issuing practitioner; anything more would require him to examine the patient, which he is neither qualified nor legally permitted to do. The argument overlooks that a pharmacist can either fill a prescription or decline to do so. Hayes was charged with conspiracy to distribute controlled substances that were not issued for a legitimate medical purpose, and the jury was charged that he had to know they were not issued for a legitimate medical purpose. The same charge was given for the substantive offenses.

Verification by the issuing practitioner on request of the pharmacist is evidence that the pharmacist lacks knowledge that the prescription was issued outside the scope of professional practice. But it is not an insurance

5. This aspect of Hayes' vagueness challenge is also in effect a claim that a pharmacist cannot be subjected to § 841's criminal penalties if he dispenses controlled substances pursuant to a prescription issued by a registered practitioner. Our discussion of the issue in vagueness terms also answers this contention. If the pharmacist knows that the prescription is not a prescription within the meaning of the regulations, he must decline to fill it or face the criminal sanctions of § 841.

policy against a fact finder's concluding that the pharmacist had the requisite knowledge despite a purported but false verification. The pharmacist is not required to have a "corresponding responsibility" to practice medicine. What is required of him is the responsibility not to fill an order that purports to be a prescription but is not a prescription within the meaning of the statute because he knows that the issuing practitioner issued it outside the scope of medical practice.[6]

This court said in *Collier* that "Congress did not intend for doctors to become drug 'pushers' ". 478 F.2d at 272. Nor do we think that Congress intended to allow pharmacists to aid doctors in becoming pushers. When a pharmacist fills a prescription that he knows is not a prescription within the meaning of the regulations he is subject to the penalties of § 841.

[3] The sufficiency of the evidence argument is almost frivolous. Following is some of the circumstantial evidence. A tremendous number of prescriptions were filled by Hayes on the purported orders of a single doctor who, during the period involved, was an alcoholic and continually under the influence of alcohol and moving from one temporary lodging place to another. The volume of drugs was massive. Considering just one of the relevant customers, Claude Meade, during one month Hayes filled

6. The challenged regulation makes clear that this is the responsibility imposed on pharmacists. Standing alone, the phrase "corresponding responsibility" is not crystal clear, but when read in context the regulation gives adequate notice of proscribed conduct to pass muster. It is also evident that a pharmacist can fulfill his responsibility under § 1306.04 without practicing medicine. The facts of this case show how a pharmacist can know that prescriptions are issued for no legitimate medical purpose without his needing to know anything about medical science.

for him 34 prescriptions for Dilaudid, representing 3400 pills for which Meade paid $3,400, and 75 prescriptions for Preludin at $75 each, or $4,125. The following month Hayes fiilled for Meade 101 prescriptions for Dilaudid and 137 for Preludin, for which he was paid, respectively, $10,000 and $10,825. Meade testified that he sold the drugs on the street at a wholesale rate of $4.00 per Dilaudid tablet and $3.00 per Preludin tablet. During the relevant time Meade lived with the doctor off and on and part of the time kept him hidden out in various hotels and motels. Hayes possessed a supply of the doctor's prescription forms which he gave to customers to have filled out and signed by the doctor. The prices charged by Hayes for drugs were unusually high. The doctor himself testified that during the period in question he had no legitimate patients and that any prescriptions written by him were not written in the usual course of medical practice or for a legitimate medical purpose. The volume of prescriptions filled for a single individual as well as the prices charged by Hayes support the jury's conclusion that Hayes also knew that the prescriptions were not issued for a legitimate medical purpose.

Hayes complains that the government only cited § 1306.04 of the regulations in the indictment and that § 1306.05 should have also been cited. Assuming that § 1306.05 should have been cited, it is clear that Hayes cannot show he was prejudiced.

AFFIRMED.